

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of |) | |
| |) | |
| Petition for Declaratory Ruling that |) | WC Docket No. 09-154 |
| the Telecommunications Rate Applies to Cable |) | |
| System Pole Attachments Used to Provide |) | |
| Interconnected Voice over Internet Protocol |) | |
| Service |) | |

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. (“Qwest”) submits these comments with respect to the Electric Companies’ Petition for a Declaratory Ruling that Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Voice over Internet Protocol Service.¹ Section 224 of the Communications Act² grants the Commission authority to regulate pole attachment rates for all providers of telecommunications services, including ILECs. Qwest reiterates its support for the Commission’s tentative conclusion in the pole attachment *NPRM* that all categories of providers should qualify for the same pole attachment rate for all attachments used for broadband Internet access service.³ One rate for all types of providers of broadband Internet access promotes deployment, eliminates discriminatory practices associated with choosing a single type of service to base rates, and ensures fair competition.

¹ Petition of American Electric Power Service Corporation, Southern Company Services, Inc., and Xcel Energy Services, Inc. (collectively, the “Electric Companies”) for a Declaratory Ruling, filed July 23, 2009.

² 47 U.S.C. § 224.

³ *In the Matter of Implementation of Section 224 of the Act: Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2007) (“*NPRM*”); 73 Fed. Reg. 6788 (Feb. 6, 2008).

I. COMMISSION REGULATION OF RATES, TERMS AND CONDITIONS FOR ILEC ATTACHMENTS TO POLES UNDER SECTION 224 HELPS ENSURE FAIR COMPETITION.

As discussed in the *NPRM* and comments provided in that docket, Qwest agrees with the position of the USTelecom that the Commission has independent authority under Section 224 to regulate reasonable rates, terms and conditions for ILEC attachments to utility poles.⁴ And, in this docket, the Electric Companies correctly point out that applying a cable rate to attachments used to provide VoIP gives cable companies a competitive edge⁵ but do not go far enough in their assertions when they limit the discussion to competitive telecommunications carriers. The pole attachment rate picture is not complete without including ILECs. ILECs providing broadband and other services should not be subject to a different rate than other attachers using the same amount of space and providing similar services.

But that is the situation created by the current rules. Section 224(f)(1) of the Act guarantees a cable telecommunications system or “any telecommunications carrier” nondiscriminatory access to a utility’s poles, ducts, conduit, or rights-of-way (“poles”). Yet, Section 224(a)(5) specifically excludes ILECs from the definition of “telecommunications carrier.” And the Commission’s pole attachment rules (47 C.F.R. §§ 1.1401-1.1418) currently do not address pole attachments sought or obtained by ILECs while they do address what ILECs must charge to attachers on their poles. This leaves ILECs as attachers to electric poles in a position of being required to negotiate their attachments’ rates, terms and conditions with the owners of the poles to which they wish to attach, without recourse to the Commission if they view that the rates, terms, and conditions pole owners seek for attachments are excessive or

⁴ United States Telecom Association Petition for Rulemaking, RM-11293, filed Oct. 11, 2005. See *NPRM* at 20204-05 ¶¶ 23-24 (discussing USTelecom’s position).

⁵ Petition at 2.

unfair. However, ILECs as owners of poles are subject to the Commission's pole attachment rate rules. This dual-rate system for ILECs means many resources are devoted to administrative matters, including trying to obtain evidence from a pole owner that a particular rate is justified without recourse to the Commission or even Section 224; these resources might otherwise be turned to furthering deployment of broadband facilities and technologies.

Qwest agrees with USTelecom that Sections 224(b)(1) and 224(a)(4) provide an independent right to reasonable rates, terms, and conditions for any pole attachment by a "provider of telecommunications service," and that the statute applies the "just and reasonable" standard to pole attachments for all such providers, including ILECs. Thus, the Commission can and should adopt rules to regulate the reasonable rates, terms, and conditions of ILEC pole attachments that are consistent with the rates, terms and conditions of other attachers using the same amount of space on a pole.

At the core of this statutory authority issue is whether the statutory terms "telecommunications carrier" and "provider of telecommunications service" in Section 224 have the same or different meanings for purposes of applying the provisions of the statute. Qwest agrees with USTelecom that the terms are specifically used and intended to have different meanings. The statute defines "pole attachment" to mean "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."⁶ Immediately following this definition the statute defines "telecommunications carrier" for purposes of Section 224, to exclude ILECs.⁷ Because the definition of "pole attachment" refers to a "provider of telecommunications service" and not "telecommunications carrier," "pole attachment" as used in the statute encompasses ILEC

⁶ 47 U.S.C. § 224(a)(4).

⁷ 47 U.S.C. § 224(a)(5).

attachments. Most critically, Section 224(b) requires the Commission to regulate rates, terms and conditions of all “pole attachments,” including ILEC pole attachments.⁸

Qwest agrees with USTelecom that had Congress intended to exclude ILEC attachments from any regulation by the Commission, it easily could have limited the term “pole attachments” to attachments by a cable television system or a “telecommunications carrier.” The fact that Congress did not use this specific terminology -- especially with the definition of “telecommunications carrier” immediately following the definition of “pole attachment” -- seems intentional.

Further, U.S. Supreme Court holdings support the argument that the Commission has general authority under Section 224(b) to regulate the rates, terms, and conditions of ILEC pole attachments. In *NCTA v. Gulf Power*, 534 U.S. 327 (2002), the U.S. Supreme Court upheld the Commission’s decisions to (1) adopt a rate for pole attachments by cable providers offering both cable television and Internet services and (2) include attachments by wireless carriers within the scope of Section 224. On the first issue, the Supreme Court rejected the Eleventh Circuit’s conclusion that Section 224 does not permit the Commission to set any rates for pole attachments beyond those expressly set out in the statute. The Court found that “this conclusion has no foundation in the plain language of §§ 224(a) and (b).” Though Congress prescribed specific formulas for ‘just and reasonable’ rates for certain attachments by cable TV providers and

⁸ Specifically that Section states that unless a state has satisfied the criteria of subsection (c) to regulate pole attachments, the Commission “shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.” 47 U.S.C. § 224(b)(1).

telecommunications carriers, “nothing about the text of §§ 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed.”⁹

On the second issue, the Court found that a wireless provider is a “provider of telecommunications service,” such that its attachments were “pole attachments” for Section 224 purposes. Similarly, an ILEC is a “provider of telecommunications service,” such that its attachments are “pole attachments” for Section 224 purposes. The Commission’s authority regarding pole attachment terms, conditions and rates under Section 224 reaches to ILECs’ attachments on the poles of other entities.

II. THE COMMISSION SHOULD REQUIRE A SINGLE RATE FOR ALL BROADBAND ATTACHMENTS.

Additionally, the Commission has authority under Section 224 to require a single rate for all attachments used to provide broadband Internet access but it need not distinguish VoIP separately or require cable companies to move to the Telco rate as the Electric Companies suggest. The Commission has pointed out and the Electric Companies concur that, “the once-clear distinction between ‘cable television systems’ and ‘telecommunications carriers’ has blurred as each type of company enters markets for the delivery of services historically associated with the other.”¹⁰ The U.S. Supreme Court’s holding in *Gulf Power* also provides strong support for the Commission’s authority to adopt a separate rate for pole attachments used to provide broadband service. The Court found that Congress’ inclusion of prescribed formulas for ‘just and reasonable’ rates for certain attachments by cable TV providers and telecommunications carriers did not “suggest that these are the exclusive rates allowed.”¹¹ Thus,

⁹ *Gulf Power*, 534 U.S. at 335 (citation omitted).

¹⁰ *NPRM*, 22 FCC Rcd at 20200-01 ¶ 14.

¹¹ *Gulf Power*, 534 U.S. at 335 (citation omitted).

if the Commission accepts its authority to regulate the rates, terms, and conditions of ILEC pole attachments, it can establish a single rate for all pole attachments used to provide broadband service, including ILEC attachments.

And, moving to a single rate for all broadband Internet access providers allows the issue of what kind of service VoIP is to remain in the *IP-Enabled Broadband Services* proceeding. Further, moving toward a single rate for attachments for providers of broadband Internet access in the geographic area covered by a pole attachment agreement, to the extent permitted by statute, will reduce the competitive inequities that the current rate scheme creates. Having different rates for separate categories of providers makes increasingly less sense as cable providers and telecommunications service providers increasingly use their attachments to provide various types of bundled services. For instance, a cable provider that uses its attachment to provide video, broadband Internet service and VoIP will get the cable rate while a telecommunications service provider that uses an attachment to provide video, broadband Internet service and telephone service will get the Telco Rate. Even further, if the telecommunications service provider is an ILEC, it may pay yet a third rate to acquire an attachment to provide the same services.¹² These rate disparities unfairly impact the competitive position of these providers in the marketplace and may also artificially impact costs for consumers. The easiest and most straightforward way to address these rate disparities is to move to a single rate for pole attachments that is based on the amount of space occupied within the communications space on the pole. At least moving to a single rate for all attachments by providers who make broadband access available, including ILEC attachments, should lessen the

¹² In negotiating attachment rates with electric utilities Qwest is not privy to the rates the electric utilities charge to others. Consequently, Qwest does not know how its rates for attaching to electric utility poles compare to rates charged to other attachers offering the same types of services.

competition-inhibiting effects of the current pole attachment rate disparities, while staying within the confines of the existing statutory framework.¹³ A single rate levels the playing field for providers of broadband services.

Respectfully submitted,

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¹³ Additionally, the dual-rate scheme creates an incentive for attachers eligible for the rates to acquire the lower rate whenever possible rather than applying the rate applicable based on the services that are being provided using the attachments. Proper application of the Telco rate is difficult if a company does not acknowledge when it is a telecommunications service provider or is using the attachments to provide telecommunications service. A single rental rate for all communication space attachments would alleviate this problem. With respect to wireless carriers, Make-ready work required to allow wireless attachments may be substantially higher compared to other telecommunications carriers, but will be at the expense of the wireless attacher. But, if a wireless provider is permitted to attach facilities to pole tops, pole owners should receive a market rate of compensation, because unlike lateral space, each pole has only one top.

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 09-154; 2) served via email on the Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission at CPDcopies@fcc.gov; and 3) served via email on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/ Ross Dino

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